

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 12672 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the Civil Judge? : NO
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JAFARKHAN ALIAS JAFARBATLI

Versus

COMMISSIONER OF POLICE

Appearance:

1. Special Civil Application No. 12672 of 2000
MR ANIL S DAVE for Petitioner No. 1
MS BANNA S DUTTA for Petitioner No. 1
MR HL JANI ASSTT GOVERNMENT PLEADER for Respondent No. 1-3

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 02/07/2001

ORAL JUDGEMENT

#. Heard Mr.Anil S. Dave, learned advocate appearing on behalf of the petitioner and Mr.H.L.Jani, learned AGP for respondent - State.

#. In the present petition, order of detention dated 16th August, 1999 which was actually effected on 23rd November, 2000 has been challenged by the petitioner under Article 226 of the Constitution of India. The order of detention has been passed by the Police Commissioner, Ahmedabad City against the present petitioner under Section 3[1] of the PASA Act and the grounds of detention are communicated and supplied by the detaining authority to the present petitioner under Section 9[1] of the PASA Act. According to the grounds of detention, in all four offence have been registered against the present petitioner under the provisions of Bombay Prohibition Act. The detaining authority has claimed privilege under Section 9[2] of the PASA Act. The statements of secret witnesses have also been recorded on 15th August, 1999 and on the next date, i.e. on date 16th August, 1999 statement of secret witnesses have been verified by the detaining authority on the same day, order of detention has been passed by the detaining authority.

#. Mr. Anil S. Dave, learned advocate has submitted that though the impugned detention order is challenged on various grounds but according to his submission, there are two grounds sufficient for vitiating the order of detention. According to the submission of Mr. Dave, his first contention is that the order of detention has been passed by the concerned detaining authority on 16th August, 1999 on the very same day on which the statements of the secret witnesses were verified by the detaining authority. Therefore, he submitted that the order of detention has been passed in a mechanical manner without application of mind and without verifying the genuineness of the statements recorded from the secret witnesses by the detaining authority. However, the second contention raised by Mr. Anil S. Dave, on behalf of the petitioner in para-8 and 9 of the petition and accordingly, some of the pages in the grounds of detention supplied to the petitioner are illegible, for which, Mr. Dave has relied upon the decision of this Court reported in 2000 [3] GLR 2696. According to Mr. Dave, a copy of the FIR in respect of the Crime Register vide C.R.No.5019 / 99 at Rakhiyal Police Station is not legible copy and page 64 and 90 supplied to the petitioner along with grounds of detention, sent to the petitioner are illegible. He submitted that in a representation at p.120 of the petition, the petitioner has requested to the concerned authority to supply legible documents but the same has not been supplied to the petitioner by the detaining authority. Therefore, according to the learned advocate Mr. Dave, legible copy has not been supplied to the

petitioner and therefore, reliance is placed on the decision of the Apex Court in case of Sm. Dharmishtha Bhagat vs. State of Karnataka, reported in 1989 Supp. [2] SSC p.155.

#. Learned AGP Mr.H.L.Jani appearing on behalf of the respondent - State has submitted that the State Government has filed reply of the detaining authority Commissioner of Police, Ahmedabad City and in para-8 of the reply on page 133, a detailed reply has been given by the detaining authority that the detention order has been passed after considering all the relevant materials and facts of the case available on the record and consequent upon subjective satisfaction, detention order has been passed. He also submitted that the detaining authority has considered the genuineness of the statements made by the secret witnesses and after application of mind, the order of detention has been passed. He also submitted that so far the contention raised in para-26 of the petition is concerned that legible copy has not been supplied, however, the detaining authority has given reply in para-17 which is at page-141 that the copies of the documents are supplied to the detenu are clear and legible and therefore this contention is not correct and the same may not be considered by this Court.

#. I have considered the respective submission of both learned advocates and looking to the records of the present case, order of detention has been passed on 16th August, 1999 on the very same day on which the statement of the secret witnesses have been verified by the detaining authority. Considering this fact, it is felt that order of detention seems to have passed hurriedly by the detaining authority without taking any time to verify the genuineness of the statements and facts given by the secret witnesses and therefore this order of detention seems to have passed by the authority in a mechanical manner without application of mind. In above view of the matter, view taken by this Court in a decision reported in 2000 [3] GLR p.2696 are most relevant and the observations made therein are as under :-

"After referring to Kalidas C. Kahar V. State of Gujarat, 1993 (2) GLR 1659 the Court observed :

The statements of the three witnesses in the instant case which were recorded before the Police Inspector on 17th August, 1999, 21st August, 1999 and 25th August, 1999 with regard to the incidents dated 10th July, 1999, 13th June, 1999 and 26th June, 1999 were the material along

with the proposal which is said to have made on 27th August, 1999 and it is clear from the record that it was on 29th August, 1999 that the detaining authority has recorded its verification of all these three statements. There is nothing on record to show that the detaining authority had considered the proposal dated 27th August, 1999 at any time prior to 29th August 1999 and on 29th August, 1999, all that has been done is that the concerned witnesses have stated before the detaining authority that the statements as had been made on the respective dates were correct and immediately thereafter on the following day, i.e. on 30th August, 1999 the detention order has been passed. [para 9]

The manner in which the verification has been recorded of the statements made by these three witnesses for the purpose of Section 9(2) shows that the same has been done only as an empty formality inasmuch as the same witnesses had been called before the statements made by the witnesses were correct. Thus, the whole exercise appears to have been done as a mechanical exercise and it is not borne out that there is an active application of mind on this aspect of the matter by the detaining authority for the purpose of verification of the facts as had been disclosed by the witnesses so as to express the fear and to invoke the privilege under Section 9(2) against the disclosure of the names and addresses of the witnesses and it thus appears on the basis of the ratio of the decision of the Division bench that it is a case of wrong exercise of power under Section 9(2) and it is established that in such cases, the wrong exercise of power under Section 9(2) adversely affects the detenu's right of making an effective representation guaranteed under Article 22[5] of the Constitution of India. [para 9].

Once the materials are placed before the detaining authority with the proposal by the sponsoring authority, it must have reasonable sufficient time for the purpose of verification of the facts and the consideration of the entire material with an active application of mind and the order has to be passed at the earliest opportunity, but in this process to strike the balance between the public interest and the right of the detenu either of the two should not be

defeated in any manner and the whole process must indicate that the detaining authority had applied its mind with the requisite approach and it had also devoted sufficient time before arriving at the decision to claim the privilege under Section 9(2) of the Act and also to come to the conclusion that the detenu was required to be detained immediately. In the facts of the present case, I find that this requirement of maintaining the balance has been defeated and the detention order has been passed on 30th August, 1999, i.e. on the next day to the date on which the materials were considered by the detaining authority. [para 9]

#. In respect of the contention raised as to illegible copy supplied to the petitioner as raised in Para-26 of the petition, reply in para-17 on page 141 of the petition submitted by the detaining authority is not correct because this Court has personally verified the pages nos. 105 and 90 and on verification of these documents it is found that the same are illegible and even when the same is shown to Mr.H.L.Jani, learned AGP, he also fairly agreed that these are the documents which are not legible properly and therefore, inspite of the demand made by the petitioner at page 120 in his representation to supply copy of the documents, but even though same has not been supplied by the detaining authority to the petitioner. Therefore, the view taken by the Apex Court in reported decision of 1989 Supp [2] p.155 rendered in case of Smt.Dharmishtha Bhagat, the relevant observations made in para-5 and 7 are as under :-

"5. The learned counsel appearing on behalf of the respondent 1, Union of India has contended that even though legible copy of Panchnama referred to in the list of documents mentioned in the grounds of detention has not been supplied to the detenu yet the fact that five gold biscuits of foreign marking were recovered from the possession of the detenu was sufficient for subjective satisfaction of the detaining authority in making the said order of detention. So the detention order cannot be termed as illegal and bad for non supply of legible / typed copy of the said document i.e. Panchnama dated February 12, 1988. The Panchnama dated February 12, 1988 which had been referred to in the list of documents referred to in the grounds of detention and a copy of which had been given to

the detenu along with the grounds of detention, is not at all legible as is evident from the copy served on the detenu. It is also not in dispute that on receiving the documents along with the grounds of detention the detenu had made representation to respondent 1 stating that some of the documents including the Panchnama which had been supplied to him are illegible and as such a request was made for giving typed copies of those documents to enable the detenu to make an effective representation against the same. The detaining authority on receipt of the said representation sent a reply denying that the copies of those documents were illegible and refusing to supply typed copies of the same. It is clearly provided in sub article (5) of the Article 22 of the Constitution of India that :

"(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order."

Therefore, it is imperative that the detaining authority has to serve the grounds of detention which include also all the relevant documents which had been considered in forming the subjective satisfaction by the detaining authority before making the order of detention and referred to in the list of documents accompanying the grounds of detention in order to enable the detenu to make an effective representation to the Advisory Board as well as to the detaining authority. Therefore, the non supply of legible copy of this vital document i.e. Panchnama dated February 12, 1988 in spite of the request made by the detenu to supply the same renders the order of detention illegal and bad. This Court in Mehrunissa Vs. State of Maharashtra has observed that : [SSC p.710]

"The detenu was entitled to be supplied with copies of all material documents instead of having to rely upon his memory in regard to the contents of the documents. The failure of the detaining authority to supply copies of such documents vitiated the detention, as has been

held by this Court in the two cases cited by counsel. The detenu is, therefore, entitled to be released. He is accordingly directed to be released forthwith."

7. Considering these decisions we are constrained to hold that the refusal on the part of the detaining authority to supply legible copies of the said relevant document to the detenu for making an effective representation infringed the detenu's right under Article 22[5] of the Constitution. The order of detention is, therefore, set aside and the detenu is directed to be released forthwith. The appeal is thus allowed."

#. In light of these observations of the Apex Court as well of this Court and looking to the facts of the present case that the detention order has been passed on 16th August, 1999 on the day on which the statements of secret witnesses have been verified by the detaining authority, which ultimately amounts to non application of mind and order of detention has been passed in a mechanical manner because some time is necessary to verify the genuineness of the facts of the statements recorded from the secret witnesses. But without taking any time on the same day order of detention has been passed and privilege under Section 9[2] of the PASA Act has been claimed by the detaining authority, which adversely affected the right of the detenu for making effective representation. So far the second contention is concerned that two documents are not legible as raised in para-26 of the petition and considering the reply at page 141 in para-17, so also looking to the demand made by the petitioner at page 120 to supply the copy of the legible documents but as such there remains no substance in the submission of the other side and therefore, according to my opinion, not to supply legible copy in spite of the demand, had adversely affected the legal and fundamental rights of the petitioner to make effective representation and ultimately violated fundamental rights guaranteed under Article 22[5] of the Constitution. Therefore, after taking into consideration the observation made by the Apex Court, according to my opinion, order of detention is required to be quashed and set aside.

#. In the result, the present petition is thus allowed. The order of detention dated 16th August, 1999 made it effective actually on 23rd November, 2000 passed by the Police Commissioner of Ahmedabad City is hereby quashed

and set aside. The present petitioner - detenu - JAFARKHAN ALIAS JAFARBATLI who is detained at Rajkot Jail is ordered to be set at liberty if he is not required in any other case. Rule is made absolute with no order as to costs.

Date : 2-7-2001 [H.K.Rathod, J.]

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